BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In The Matter of	)	
	)	
Policies and Rules	)	
Pertaining to the Equal	)	RM - 8012
Access Obligations of	)	
Cellular Licensees	)	

COMMENTS OF WILTEL, INC.

WilTel, Inc. ("WilTel"), in the following comments, supports applying uniform, nationwide equal access procedures to all cellular licensees.

I. INTRODUCTION

As MCI stated in its petition, the cellular industry, which now serves approximately eight million subscribers, has greatly surpassed the optimistic growth projections made in the early 1980's. Undoubtedly, many of these eight million subscribers use their cellular system to make long-distance calls. When making interexchange calls, subscribers of non-BOC companies are, to the best of WilTel's knowledge, forced to use AT&T's services, while cellular subscribers of Bell Operating Companies ("BOCs") are able

to select an IXC as required by the MFJ[1]. Subscribers to non-BOC as well as BOC cellular systems should have the opportunity to select the IXC of their choice.[2]

II. DISCUSSION

A. Equal Access Will Promote Federal Policies

1. MFJ

The importance of eliminating interconnection disparities so that interexchange providers would be able to "compete on an equal basis" was recognized in the MFJ.[3] The MFJ required the BOCs to provide equal access or access service to other interexchange carriers which is "'equal in type, quality, and price' to the access provided to AT&T."[4] The court recognized that equal access was in the public interest, and the guarantee of equal treatment would effectively remove interconnection obstacles and free competition between the other IXCs and AT&T.[5] Likewise, requiring cellular equal access will encourage competition between other IXCs and AT&T by removing interconnection obstacles so that all IXCs can

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[1]United States v. American Tel. & Tel., 552 F. Supp. 131 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 101 (1983) (hereinafter "MFJ").

[2]Cellular licensees can be divided into three groups: (1) the BOCs, which are subject to the MFJ's equal access provisions; (2) other LEC-affiliated carriers; and (3) carriers not affiliated with a LEC. WilTel submits that all three types of licensees should be subject to equal access requirements.

[3]552 F. Supp. at 195.

[4]Id. at 196.

[5]Id.

compete on an equal basis.

2. Commission Policy

Recognizing the importance of equal access to competition, the Commission requested comments to determine whether the MFJ's equal access policies should be applied to independent telephone companies ("ITCs").[6] In its Notice of Proposed Rulemaking, the Commission proposed extending the MFJ's BOC interconnection obligations to the ITCs and stated that the extension was appropriate in light of its "statutory mandate to promote the development of efficient and broadly available service on a nationwide basis . . . ."[7]

In its subsequent Report and Order, the Commission noted that "all sectors" agreed that it was desirable to require the ITCs to implement equal access and required implementation according to specified timetables.[8] Likewise, requiring non-BOC cellular licensees to provide equal access to all IXCs would promote the development of efficient and broadly available competitive interexchange service on a nationwide basis. Thus, IXCs would be given the opportunity to compete with AT&T while consumers of cellular telecommunications services would be free to select their preferred IXC.

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[6]MTS & WATS Market Structure, CC Docket 78-72, Phase III, Notice of Proposed Rulemaking, 94 F.C.C.2d 292 (1983).

[7]Id.

[8]MTS & WATS Market Structure, CC Docket 78-72, Phase III, Report & Order, 100 F.C.C.2d 292, ¶¶ 26, 59 (1985).

B. Existing Practices Thwart Federal Policies

1. Equal Access Policies

To WilTel's knowledge, cellular companies, other than those bound by the MFJ, do not provide equal access to their customers. This failure violates The Communications Act's prohibitions on unreasonable practices[9] and unjust discrimination.[10]

The Commission previously found the BOCs' practice of automatically "defaulting"[11] a customer's interexchange call to AT&T when the customer failed to presubscribe or select another IXC was unreasonable and discriminatory.[12] Thus, even when the customer was given a choice and failed to exercise that choice, the Commission found the BOCs' practice of presubscribing AT&T violated Sections 201(b) and 202(a).[13] Yet in the present situation, customers of non-BOC cellular licensees are not given an opportunity to choose an IXC. Cellular licensees' practice of

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[9]Section 201(b) prohibits unreasonable practices. 47 U.S.C. § 201(b) (1988). In defining what is "unreasonable," the Commission should consider the statutory policies favoring unimpeded interconnections, id. § 201(a) and fair competition, id. §§ 313, 314. Because cellular licensees use scarce radio spectrum, they are fully subject to the federal policies set forth in Title III, as well as the common carrier obligations of Title II of the Act.

[10]Id. § 202(a).

[11]"Defaulting" occurs when a BOC routes interexchange calls to AT&T upon a customer's failure to designate a long distance carrier. 101 F.C.C.2d 911, ¶ 1 (1985).

[12]Investigation of Access & Divestiture Related Tariffs, CC Docket 83-1145, Phase I, Memorandum Opinion & Order, 101 F.C.C.2d 911 (1985).

[13]Id. at ¶ 22.

denying all IXCs equal access and preselecting AT&T as the IXC for the cellular customer is likewise unreasonable and discriminatory.

2. Restraint of Trade

By denying other IXCs equal access and denying cellular subscribers their choice of an IXC, the independent cellular licensees are restraining competition in the market for interexchange services. Section One of the Sherman Act provides in part that all contracts in restraint of trade or commerce are illegal.[14]

In Jefferson Parish Hospital Dist. No. 2 v. Hyde,[15] a hospital agreed to use only the services of a particular anesthesiology firm. An anesthesiologist not associated with the firm was not able to perform anesthesiology services even if requested by a patient.[16] The Court stated that an unlawful tying arrangement exists when the seller uses its market power in one market to force a buyer to purchase a product the buyer did not want or would have liked to have purchased elsewhere on different terms.[17] The Court further stated that when market power in one market is used to impair competition in another market, the impairment could harm existing competitors or create entry barriers

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[14]15 U.S.C.A. § 1 (West Supp. 1992).

[15]466 U.S. 2 (1984).

[16]Although the agreement was later amended to delete the clause excluding other anesthesiologists from performing services for the hospital, the hospital continued to exclude other anesthesiologists as if the agreement had not been amended.

[17]Id. at 12-14.

for potential competitors.[18]

The Court determined that the hospital was offering two distinct services in one transaction.[19] However, because seventy percent of patients residing in the area selected other hospitals, the Court determined that the hospital lacked market power.[20] Without the requisite market power, the Court refused to apply the per se rule against tying and therefore considered whether competition for anesthesiologists was in fact restrained.[21] The evidence in the record, however, was insufficient for the Court to conclude that the market for anesthesiology services had been adversely affected by the contract. Consequently, the Court found no Sherman Act violation.[22]

In the present situation, however, independent cellular licensees do have market power. Generally only two cellular licensees provide service to each area. One licensee is usually affiliated with the local Bell Operating Company while the second licensee is an independent or non-BOC cellular licensee. This duopoly market ensures that both licensees have market power. Non-BOC cellular licensees are using their market power in the cellular market to impair competition in the interexchange market. The non-BOC cellular licensees' practice of forcing customers to purchase AT&T's interexchange services constitutes a tying arrangement

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[18]Id. at 14.

[19]Id. at 21-24.

[20]Id. at 26-27.

[21]Id. at 27-29.

[22]Id. at 29-32.

which, in the presence of market power, is a per se violation of The Sherman Act. At the very least, such restraints are unlawful under the antitrust laws' rule of reason test, because of the anticompetitive effects.[23]

Any act or practice which violates the Sherman Act is presumably an unreasonable practice under Section 201(b).[24] Moreover, Section 313(a)[25] provides in part that laws relating to unlawful restraints and agreements in restraint of trade are applicable to interstate radio communications which encompasses cellular communications. Section 313 further provides that licensees found guilty of violating such laws may also have their license to provide radio communications revoked.[26]

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[23]Even if no violation of the antitrust laws has occurred, any exclusive dealing or tying arrangements imposed by a duopolist should be deemed unreasonable under The Communications Act.

[24]See 47 U.S.C. § 201(b) (1988).

[25]47 U.S.C. § 313(a).

[26]Id.; cf. id. § 314 (prohibiting cross-ownership by licensees which has anticompetitive effect).

3. Infrastructure Reliability

The lack of cellular equal access decreases the reliability of communications during emergency situations. For example, during and after Hurricane Andrew, relief agencies and thousands of people and in Florida and Louisiana relied on non-BOC cellular communications to replace local exchange service. If AT&T's network had been interrupted, those customers also would have been isolated from the nation's interexchange infrastructure. If, however, full equal access is provided,[27] then only a simultaneous failure of all IXC networks would isolate cellular customers from contact with locations outside the local exchange area.

C. Implementing Equal Access

True equal access has three components. First, subscribers must have the option of selecting among available IXCs. Second, all incentives to discriminate must be removed, to the extent practical. Finally, discrimination among IXCs must be prohibited.

Providing cellular subscribers with the right to select their IXCs will not, without more, ensure free choice and fair interexchange competition. In addition, the local carrier must be indifferent as to the identity of the selected IXC. The MFJ

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[27]This would include the ability to use access codes to "dial around" the presubscribed interexchange carrier. Even if a customer could use only his or her presubscribed carrier, allowing customers to diversify would ensure that at least some non-BOC cellular phones could reach the outside world in the event of an AT&T outage.

accomplished this by forcing AT&T to divest the BOCs, thereby removing the most significant incentive for BOC discrimination among IXCs. The Commission can accomplish the same objective in this proceeding by prohibiting cellular carriers from directly or indirectly reselling interexchange services.[28]

Prohibiting such resale not only eliminates the incentive for non-BOC cellular carriers to favor AT&T (or any other IXC), it also increases the competitiveness of the cellular market. Currently, a non-BOC cellular company can aggregate "its" interexchange traffic, i.e., the traffic of its subscribers, in order to receive volume discounts;[29] the BOCs, and properly so, are denied this opportunity.

Notwithstanding the elimination of the most significant incentive to discriminate, the Commission must have rules prohibiting such discrimination. For example, as mentioned above,[30] the BOCs attempted to allocate all "default" IXC presubscriptions to AT&T, even though they had no real incentive to do so.

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[28]IXCs wishing to provide service via affiliated cellular systems should be required to do so only through fully separate subsidiaries.

[29]Apparently, these cost savings are not passed on to customers, because of the duopoly nature of the cellular market. See Communications Daily, Aug. 13, 1992, at 8-9 (citing BOC study submitted to Department of Justice).

[30]Supra, at pp. 4-5.

III. CONCLUSION

Wherefore, WilTel respectfully requests that the Commission require non-BOC cellular licensees to interconnect with interexchange carriers via, uniform, nationwide cellular equal access procedures.

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CERTIFICATE OF SERVICE

I, Diana Neiman, do hereby certify that copies of the foregoing **Comments by the WilTel, Inc. on Policies and Rules Pertaining to the Equal Access Obligations of Cellular Licensees** were sent September 2, 1992, by first class mail, postage prepaid, to the following:

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Diana Neiman